

EXHIBIT “C”

82E5GREA

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82E5GREA argument
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

GREYSTONE CDE, L.L.C.,

Plaintiff,

v.

07 Civ. 8377 (RPP)

SANTE FE POINTE, L.P., SANTA
FE POINTE MANAGEMENT, L.L.C.,
RANT, L.L.C. and THEOTIS F.
OLIPHANT,

Defendants.

-----X

February 14, 2008
11:00 a.m.

Before:

HON. ROBERT P. PATTERSON, JR.,

District Judge

APPEARANCES

HARNIK, WILKER & FINKELSTEIN, L.L.P.
Attorneys for Plaintiff
BY: STEPHEN M. HARNIK
CHRISTIAN VOTAVA

AKERMAN SENTERFITT, L.L.P.
Attorneys for Defendants
BY: DONALD DAVID
BRIAN BLOOM
JEREMY SHURE

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(Case called)

THE DEPUTY CLERK: Is the plaintiff ready?

MR. HARNIK: Yes, your Honor.

THE DEPUTY CLERK: And defendant ready?

MR. DAVID: Yes, your Honor.

THE COURT: I better have identification, please. Who
is going to argue for Greystone?

MR. HARNIK: Good morning, your Honor. Stephen Harnik
for the plaintiff Greystone. This is Christian Votava who is
newly admitted in New York State waiting for admission in the
Southern District.

THE COURT: Who is going to argue for the defense?

MR. DAVID: Donald David. With me is Brian Bloom and

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14 Jeremy Shure.

15 THE COURT: I guess it is your motion.

16 MR. DAVID: Your Honor, if I may? Obviously one of
17 the motions is mine, the other is the plaintiff's. If the
18 Court would prefer, I can address both at the same time. I
19 don't know the Court's preference on that.

20 THE COURT: well, you filed the motion. I don't mind
21 if you want to argue them at the same time.

22 MR. DAVID: Then, if I may, I will do so. To some
23 extent I do believe that they are related.

24 THE COURT: As long as you don't mix the arguments up
25 so that I am not sure which motion you are addressing.

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1 MR. DAVID: well, perhaps then your Honor --

2 THE COURT: You better do them seriatim.

3 MR. DAVID: Your Honor, I will be glad to do that.

4 Let me start first with the motion that we made which
5 is a motion for a stay pending the determination in California
6 on the motion for a change of venue that the plaintiff here,
7 defendant there, made; or, in the alternative, for a stay
8 pending the resolution of the California action in the instance
9 that the California Court declined to transfer.

10 As the Court now knows, the California Court made its
11 determination on the plaintiff's motion out there and
12 determined that it was not going to transfer the case here.
13 And in its reply brief the plaintiff argues that the Court, in
14 California, determined that the guarantee was not in fact
15 covered by what was pending in California.

16 Respectfully, your Honor, that simply is untrue. If
17 one looks at the very, very first paragraph of the decision in
18 the California Court it says the following:

19 This action was initially filed in Alameda County
20 Superior Court, and subsequently removed by the defense --
21 defendants in that case being the plaintiff in this case, in
22 part -- to this court on the basis of the diversity
23 jurisdiction. Defendants now bring a motion to transfer venue
24 asking that the Court transfer the action pursuant to 28 U.S.C.
25 1404(A) to the Southern District of New York, where a

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1 later-filed action involving related claims is pending.

2 Now, the fact of the matter is that it is absolutely
3 incontrovertible that this action is related to the action
4 which is currently pending in California which was first filed.

5 THE COURT: well, I don't read that sentence that you
6 are citing as a finding by the Court. I read that sentence as
7 what the defendants in the California action were arguing.

8 MR. DAVID: well, your Honor, with all due deference,
9 if you would take a look --

10 THE COURT: They argue that it was a related claim,
11 didn't they?

12 MR. DAVID: Your Honor, the defendants there,
13 plaintiffs here, did argue that it was a related claim. So,
14 they in fact were arguing in California that the California
15 claims were related to this action. And they were right. We
16 didn't in fact disagree with them.

17 If you look at the first amended complaint which was
18 filed in California, you will find that we -- and this appears,

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19 if I might --

20 THE COURT: Well, the pleading out there is, would not
21 be appropriate here. They don't differentiate between the
22 parties, they just collectively call everyone -- Greystone is
23 Greystone defendants and they don't separate those, the
24 corporations in any way out there. It would be a defective
25 pleading here.

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1 MR. DAVID: Your Honor, I didn't mean to interrupt,
2 that's why I stopped.

3 If I could, the important fact is this: The contest
4 in California challenges the underlying predicates for the
5 claim on the guarantee. It says that in fact the fraud was
6 committed, that there was undue duress, and that the guarantee
7 itself is invalid. Therefore, if we proceed here the answer
8 which is going to ultimately be filed, assuming an answer is
9 necessary it is going to allege all of the same factual
10 predicates as are alleged in the California action and what we
11 are going to end up having happen, absent a suggestion which
12 I'm going to respectfully make in a moment, what we are going
13 to end up having happen, absent a stay of these proceedings, is
14 we will have competing cases going on arguing exactly the same
15 factual predicates --

16 THE COURT: Well, let me warn you. I haven't granted
17 a stay in any proceeding in the entire time I have been on the
18 bench.

19 MR. DAVID: Well, your Honor, I presume from what I
20 have seen that doesn't necessarily mean that presented with the
21 appropriate facts you wouldn't do so. I have an alternative --

22 THE COURT: Well, I know. But it is a pretty hard
23 road to hoe to get a stay of action.

24 MR. DAVID: I have an alternative suggestion, your
25 Honor, which is that I believe sua sponte or if the Court would

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1 prefer on our own motion under 1404(A) you should transfer this
2 action to California.

3 THE COURT: That's a different matter.

4 MR. DAVID: All right.

5 THE COURT: That's a motion that I have granted,
6 but...

7 MR. DAVID: Your Honor, if I may, under 1404(A) you
8 have the power to do that sua sponte. I believe that if the
9 Court chooses not to do it sua sponte that the Court should
10 permit us to file the appropriate papers to seek a transfer.

11 THE COURT: Well, I think you have to take your
12 present papers because your present papers do say something
13 about moving under 1404(A) and I would have to take these
14 motion papers as that motion. I'm not going to allow further
15 motions in this case. You have got to file an answer. If I
16 keep it here you are going to have to file an answer promptly
17 and this case is going to go and be tried promptly. There is
18 no delay in this part. You go right to trial. And if I keep
19 it, that's what I will do.

20 Now, let me suggest something to you. I looked at the
21 papers. I have read the papers and this case ought to be
22 settled. You are going to spend more money on this case in
23 attorney's fees than it is worth, both sides. A number of the

24 actions probably ought to be brought in California probably
25 ought to be dismissed. Period.

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1 And, somebody ought to talk turkey to the clients
2 because you are going to spend much more money on litigation of
3 these actions than it is worth and you really ought to get into
4 mediation right away. Or, if you have a relationship with
5 opposing counsel that is professional rather than no holds
6 barred, then you ought to be able to do it yourselves if you
7 can control your clients. And we all know that's difficult, on
8 occasion.

9 MR. DAVID: Your Honor, if I may.

10 There was in fact some discussion concerning
11 mediation. The discussion broke down over, of all things, the
12 issue of whether the mediation was going to be held in New York
13 or in California. That should hardly surprise the Court given
14 the reason we are here.

15 THE COURT: What about Oklahoma?

16 MR. DAVID: Well, that certainly would be a
17 possibility, I would suggest.

18 I guess the problem we are faced with is I don't
19 disagree with anything the Court has just said but that's not
20 where we are at this point in time.

21 THE COURT: And I have to bring it up because I have
22 to -- look. I have two clients here. That's the way I look at
23 any litigation, plaintiff and the defendant. They're just as
24 if you had you had clients in your office and had to give
25 advice to either one of them. That's why I bring up the

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1 possibility of settlement.

2 Mediation, if you have attorneys that know the case
3 and are not bent on burning all bridges but rather can discuss
4 the case in a reasonable manner, or even you can delegate
5 attorneys who can discuss the case in a reasonable manner, the
6 case should be settled.

7 MR. DAVID: Your Honor.

8 THE COURT: And that would be the best way to do it
9 because if you get a mediator you are at the mercy of the
10 mediator's schedule and it takes time. But, this case should
11 be settled now.

12 MR. DAVID: Your Honor, if I may?

13 The real players in terms of the attorneys are located
14 out in California. We are sort of surrogates, I suspect. That
15 having been said, I don't disagree with anything the Court has
16 said and I don't believe we have a bad relationship with
17 opposing counsel. And I certainly would have no problem
18 talking to them.

19 THE COURT: Who is representing the parties out in
20 California?

21 MR. DAVID: In our case it is Eric Farber's office.

22 THE COURT: I don't know who that is.

23 MR. DAVID: He represents our parties out in
24 California. He's the attorney who asked us to represent them
25 here. Jones Day represents Greystone out in California.

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1 THE COURT: Of course probably the California branch
2 and it is hard to know.
3 MR. DAVID: Well, I don't have the answer to that.
4 The only questions which I can address at this point --
5 THE COURT: What about the people who negotiated, who?
6 who was representing the parties at the time all of this
7 developed?
8 MR. DAVID: I can tell you Mr. Oliphant is an
9 attorney. He may have been representing himself. I don't
10 know, categorically.
11 THE COURT: And I gather Greenberg Traurig, as I see
12 in the papers, they've got the same problem you have with Jones
13 Day. You don't know the parties when they're big law firms.
14 You just don't know the counsel --
15 MR. DAVID: I just don't know who the players are. I
16 haven't dealt with them.
17 THE COURT: -- senior or junior, what have you.
18 MR. DAVID: My suspicion is that the Jones Day people
19 are real people, they're not just minor players; they know what
20 they're doing.
21 THE COURT: Would it help if I asked for a conference?
22 MR. DAVID: I don't see --
23 THE COURT: A settlement conference?
24 MR. DAVID: Your Honor, I just don't see that that's
25 the solution among these parties because, as I said, the real
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1 players are out in California.
2 THE COURT: Well, I was going to say, I ask that the
3 real players attend the conference.
4 MR. DAVID: I have no opposition with it, your Honor.
5 THE COURT: All right. Well, I didn't mean to
6 interrupt your argument.
7 MR. DAVID: It is constructive. I truly do think
8 that.
9 That being said -- I think it is constructive -- I
10 think what you are faced with is the fact that California has
11 decided to retain jurisdiction. The issues that would be
12 resolved in this case will be resolved in the California case
13 and we run the risk that what we are going to have is two
14 Courts going at the same thing. And, respectfully, this is the
15 second filed case, that was the first filed case. The
16 plaintiffs here decided to make the motion there to transfer.
17 They lost that motion.
18 This thing should be done in one place. Whether it is
19 settled or whether it is tried, it should be done in one place.
20 And there is no question that what is going on in California is
21 related to what's happening here. The whole argument in
22 California is that there was a fraud that was perpetrated, that
23 there was undue influence. Whether there is merit to the
24 argument will ultimately be determined by a Court, not by me.
25 I'm a partisan, all right? But it will be determined by a
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1 Court one way or another -- a motion to dismiss, at trial,
2 whatever it may be.
3 But, that's what's pending and that's what's going to
4 be resolved, so it is really a waste of this Court's time and

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5 it is a waste of the party parties' money to be litigating this
6 thing in two different places.

7 THE COURT: If you were to transfer it anywhere, just
8 from my looking at the papers, it would appear to me that
9 probably the best place, if you both would agree on it, would
10 be to litigate this in Oklahoma.

11 MR. DAVID: But that's not what --

12 THE COURT: Because the key witnesses are going to be,
13 probably, if there is any merit to Mr. Oliphant's position, are
14 going to be the HUD employees and they're located, as I
15 understand it, in Oklahoma.

16 MR. DAVID: There are two problems with that though,
17 respectfully, your Honor. Number one, the California Court has
18 already decided that in fact the services of the witnesses,
19 etc., are not inconvenienced by proceeding in California; and
20 secondly, plaintiff had that option. They could have said to
21 the Court, go to Oklahoma, it will make sense. All right?
22 They didn't choose to do that.

23 THE COURT: I know.

24 MR. DAVID: They played a game of strip poker and they
25 lost.

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1 THE COURT: And you are not in a position to make such
2 a stipulation because you are not --

3 MR. DAVID: Absolutely not.

4 THE COURT: -- because you are not the real party.

5 MR. DAVID: Absolutely not.

6 And turning to the motion to dismiss, your Honor,
7 respectfully that motion is almost frivolous. Under the
8 Barney's case, clearly the motion for a stay -- and remember at
9 the time there was a pending motion which would have
10 transferred everything to New York which would have
11 necessitated a totally different answer than would be filed in
12 response solely to this complaint.

13 THE COURT: Well, are you prejudiced in any way if I
14 treat this as a motion to transfer?

15 MR. DAVID: No, your Honor.

16 THE COURT: Is the plaintiff here prejudiced in any
17 way if I treat it as a motion to transfer? As I see it your
18 papers really address the issue of the motion to transfer.

19 MR. HARNIK: Yes, your Honor. I would like to address
20 that.

21 THE COURT: Fine. But your papers already have
22 somewhat.

23 MR. HARNIK: Well, the point we want to make is that
24 we believe that that motion has been waived.

25 THE COURT: What?

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1 MR. HARNIK: We believe that that motion has been
2 waived. They did not ask for a transfer specifically so they
3 distinguish the ultimate case by saying --

4 THE COURT: I didn't see that.

5 MR. HARNIK: -- by not saying it is a transfer motion.

6 THE COURT: I didn't see the argument on that, that
7 they waived that in your papers, but I have been pretty heavily
8 engaged.

9 MR. HARNIK: Your Honor, what we address in our papers

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 10 mostly is the fact that the defendants here, plaintiffs
 11 California, waived any objection to --
 12 THE COURT: You say they've waived any objection to
 13 personal jurisdiction.
 14 MR. DAVID: We --
 15 THE COURT: I understand that argument.
 16 MR. HARNIK: We also take the position that -- they've
 17 moved for a stay and not for a transfer. And if your Honor
 18 will have a look at, there is a case --
 19 THE COURT: But where in your papers have you said
 20 that they have waived the motion to transfer?
 21 MR. HARNIK: It is a case that I would like to bring
 22 to the Court's attention right now and it is a Second Circuit
 23 case and it is called Concession Consultants v. Irving Mirisch,
 24 it is 355 F.2d 369, and in this case --
 25 THE COURT: What is the name of the case again?
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 1 MR. HARNIK: It is called Concession Consultants v.
 2 Irving Mirisch.
 3 THE COURT: We don't have that here.
 4 MR. HARNIK: Because in Mr. David's oral presentation
 5 this morning he said that the Court sua sponte could transfer
 6 the motion of this case to California or they could make a
 7 second successive motion.
 8 THE COURT: You both argue the balance of convenience
 9 and all of that in your papers which is really the test in the
 10 1404(B).
 11 MR. HARNIK: That's really a fallback argument. The
 12 point is that the defendants signed a specific waiver where
 13 they said they will not even plead that this is an inconvenient
 14 forum. They said if -- and the Ramada case, which is cited in
 15 our brief at page 6 and the AGR cases, they both say, Judge
 16 Cedarbaum and Judge Scheindlin, they both say if you have such
 17 a clause if the plaintiff brings the action in this Court, then
 18 it becomes binding, it is here forever, even if it is a
 19 non-exclusive provision.
 20 But, your Honor, if I can go to the point --
 21 THE COURT: I'm not suggesting that you waive that
 22 argument. All I'm suggesting is that that argument would be
 23 your argument in opposition to the 1404(B). But it is as
 24 something I should take into account, but what I am saying is
 25 shouldn't I consider this as a 1404(B) motion, not as a motion
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 1 for stay, and based on the plaintiff's papers and the
 2 defendant's papers, aren't the issues for 1404(B) articulated
 3 in those papers?
 4 MR. HARNIK: No, your Honor. We take the position
 5 that they have waived that motion --
 6 THE COURT: Where do you get the waiver?
 7 MR. HARNIK: -- and that the Court cannot even sua
 8 sponte transfer the case now to California. And I'm citing
 9 this case of Concession.
 10 THE COURT: Isn't that an argument that you make in
 11 opposition to the 1404(B) transfer?
 12 MR. HARNIK: It is an argument that we addressed in
 13 our papers, that's correct, your Honor; but the motion should
 14 never have been -- should not be treated as one for transfer.
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15 MR. DAVID: Your Honor, may I respond to that
16 argument?

17 THE COURT: Yes.

18 MR. HARNIK: Your Honor, can I just --

19 THE COURT: I hear you so you have answered my
20 question. I hear your position.

21 MR. DAVID: Your Honor, if I may.

22 The case which they're talking about, I believe,
23 unless I am incorrect, is in a situation in which an action was
24 brought pursuant to a permissive venue provision and an attempt
25 then was made, on the ground of forum non conveniens, to

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1 transfer to a different jurisdiction where there was no pending
2 action. Here we have got a completely different situation. We
3 have got a situation in which there is not only a pending
4 action but there is a pending action that is totally related to
5 this action. And, not only that, but where they made the
6 motion to transfer previously, the Court has now denied it and
7 the Court will be faced with two proceedings involving the same
8 factual and the same legal issues being tried by two different
9 courts.

10 Now, there is no way in the world in which -- forget
11 forum non conveniens. The interest of judicial economy doesn't
12 quarrel for those two cases to be put together. And that's
13 what you are facing, not the situation that they're citing.

14 And, by the way, their claim that we're waiving, just
15 so we are clear, is not in any papers that we filed but they're
16 arguing somehow that we waived it by signing a permissive
17 action provision in the guarantee. All right?

18 So, they're not saying in their papers they raised the
19 argument that somehow in these proceedings we have waived it.
20 All right? So, I don't know. I'm not a Judge. I will never
21 be a Judge. I couldn't afford to be a Judge. All right?

22 THE COURT: You must have more children than I have.

23 MR. DAVID: I have two and I have to tell you, one of
24 them is going to law school. It is tough.

25 But, the important thing is why in the world would we
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1 want to try this case in two different places? Why would the
2 Courts want us to try it in two different places? It doesn't
3 make sense.

4 THE COURT: Well, I hear you. Go ahead, Mr. Harnik.

5 MR. HARNIK: Good morning, your Honor.

6 Let me just address your Honor's point about trying to
7 settle this case. We would not have an objection to a
8 mediation with the defendant, but we specifically bargained for
9 this case being handled in New York and every single document
10 that was signed by Mr. Oliphant addressed that issue and he
11 agreed, in no uncertain terms, irrevocably, that New York is
12 the proper venue for this action whether it is tort, whether it
13 is contract.

14 Our main witness is in New York. Our office is in New
15 York. We brought suit in New York.

16 The case belongs here and that's why Jones Day moved
17 to have the case transferred from California to New York,
18 because that's what was agreed to.

19 THE COURT: It lost.

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20 MR. HARNIK: It lost. We respectfully don't agree
21 with Judge Spiro's decision, but sobeit.
22 In any event, our case on the guarantees is here and
23 respectfully, as we have pointed out, we believe it is a
24 summary judgment case and we have plenty of cases, we have
25 cited them in our briefs that all of their defenses which they
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1 haven't even raised here about this adhesion and duress, don't
2 fly; that regardless of what they say --
3 THE COURT: They haven't filed an answer yet.
4 MR. HARNIK: Well, even without an answer they've made
5 these suggestions in the California Court that they didn't have
6 any choice but to sign these documents.
7 And what was the effect of these documents? What
8 happened here is that Mr. Oliphant took \$500,000 from our
9 client, so we just want our money back. The whole California
10 complaint, as your Honor suggested, doesn't even state a cause
11 of action in tort but it makes no sense. Why would our client
12 enter into this contract and at the time it enters into it have
13 in mind that it is going to fraudulently induce this gentleman
14 to enter into all of these contracts and then give him \$500,000
15 in furtherance of this fraud? They wouldn't even have known at
16 the time that they signed the engagement letter that he would
17 need money from them.

18 The whole case makes absolutely no sense that he has
19 brought in California and the fact is --
20 THE COURT: There are allegations in the California
21 action that cite as follows: That Greystone servicing, I guess
22 it is, entered into a contract to service the HUD application
23 and that they claim they didn't file it on time.

24 They claim that there came a time in December,
25 December 17th or so, documents actually signed on the 20th, for
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1 a bridge loan, but prior to that they claim that Greystone had
2 offered them also a loan to purchase the property from the
3 seller, provide the financing for it, and that they were
4 relying on that. At least that's the gist of the claim. And,
5 they claim that these papers came in on the verge of the seller
6 of the property not giving them an extension and that they also
7 had to issue the tax free bonds. They had an obligation with
8 respect to, I guess with respect to the underwriters of the
9 bond. But, in any event, it cost about \$250,000 is my
10 recollection.

11 They claim that those circumstances amount to duress.
12 I find that that's an issue of fact. I may find that other
13 rather thick for an attorney in Mr. Oliphant's circumstances to
14 really feel that that was duress and go ahead and sign the
15 papers under those circumstances.

16 But, it is an issue of fact that's been raised by the
17 defendants here so they claim that the bridge loan was
18 obtained -- or when they obtained the bridge loan they were
19 under duress. The bridge loan itself has a condition on it
20 that says that Greystone can't be held liable for any claim of
21 this sort in contract or a tort and that seems to me is
22 something that Oliphant and all should think about in
23 connection with this lawsuit.

24 But, the claim is there and it is an issue of fact.

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25 It may be one that can be disposed of, as you say, but it is an
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1 issue of fact. And all of these claims that come out later are
2 having to do with whether or not a representative of Greystone
3 Financing downgraded the project or said something downgrading
4 the project and whether or not Greystone tried to obtain
5 economic benefits from the project later are issues of fact and
6 they do appear to be somewhat, if you buy the original argument
7 that they were under duress, they could be related to this loan
8 agreement.

9 MR. HARNIK: Your Honor, I don't agree with your Honor
10 that the pertinent date is when they were discussing purchasing
11 this project. The pertinent date is August 29th, 2006. That's
12 when the engagement letter was signed. And if you read Judge
13 Chin's decision in the --

14 THE COURT: Are you talking about the service
15 agreement?

16 MR. HARNIK: The engagement letter. That's what the
17 whole California case is based on. All of the issues of fact
18 they raise are based upon this August 29th letter which they
19 say they signed at a time when -- in order for them to prove
20 any of their claims they would have to show that when they
21 signed this agreement in August of 2006 we had the present
22 intent --

23 THE COURT: What time?

24 MR. HARNIK: August 29th, 2006, that it was our intent
25 never to fulfill.

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1 THE COURT: This is based on servicing.
2 MR. HARNIK: That's right.
3 THE COURT: They're not party to this, to your claim.
4 MR. HARNIK: That's another point. Absolutely. But
5 everything that came arose from that -- their tort claims and
6 contract claims are based on that engagement letter because
7 that's the engagement letter that does not have the forum
8 selection clause. Every other agreement in this transaction
9 has New York as the forum for any disputes and it could even be
10 read that having signed the later documents which relate to
11 this document, that even though -- even this one --

12 THE COURT: There is no forum selection clause in the
13 loan agreement itself.

14 MR. HARNIK: There is, because the guarantees --

15 THE COURT: The guarantees --

16 MR. HARNIK: -- incorporate the bridge loan into them.

17 THE COURT: No, no.

18 MR. HARNIK: It says any related document. And the
19 loan document is a defined term which includes the bridge loan.
20 In fact, your Honor, that's exactly the mistake that Judge
21 Spiro made. He read out of the guarantee language and in fact
22 Oliphant, an attorney, had agreed that all documents are
23 incorporated by reference when he signed the guarantee and the
24 note.

25 And we have plenty of cases that say that you can do
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82E5GREA argument
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1 that. You can incorporate other agreements that may not have
 2 the forum selection clause in a separate agreement as long as
 3 that they're signed contemporaneously.

4 THE COURT: But it is a permissive --

5 MR. HARNIK: Regardless of that. That's exactly what
 6 the Ramada case says and what the AGR case says, that even if
 7 it is permissive once the plaintiff decides he wants to bring
 8 the case in New York, it becomes binding because that's what
 9 the parties agreed to.

10 THE COURT: Well, I haven't gotten that case.

11 MR. HARNIK: That's on page 6 of our brief.

12 THE COURT: I haven't gotten the case itself.

13 MR. HARNIK: I have it here.

14 THE COURT: Is that Judge Cedarbaum?

15 MR. HARNIK: Judge Cedarbaum and Judge Scheindlin.

16 THE COURT: Mr. David makes the point that there
 17 wasn't any pending action in another jurisdiction and we have
 18 this problem of two actions involving interpretation of the
 19 same contract.

20 MR. DAVID: Your Honor, may I be heard for a moment?

21 MR. HARNIK: But, just before I finish --

22 THE COURT: Let Mr. Harnik finish.

23 MR. HARNIK: Just to finally address the case of
 24 Concession, Mr. David is incorrect. This is not a forum -- he
 25 was referring to the, I believe, to the Altman case.

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1 The case I am citing, which is Confession Consultant
 2 v. Mirisch it says: An objection to improper venue must be
 3 made by motion or, if no motion is made, by the answer or
 4 reply. If it is not so raised, any objection to venue is
 5 waived. Unlike the matter of jurisdiction, then venue was and
 6 remains a privilege personal to each defendant which can be
 7 waived and is waived by him unless timely objection is
 8 interposed. Since the right to attack venue is personal to the
 9 parties and waivable at will, a District Judge should not, in
 10 the absence of extraordinary circumstances, impose his choice
 11 of forum upon the parties by deciding on his own motion that
 12 there was a lack of proper venue.

13 It is clear that the facts in this case furnish no
 14 justification whatever for such action by the Court.

15 This is the Second Circuit in this Concession case.

16 THE COURT: You gave me that, 355 F.2d.

17 MR. HARNIK: 355 F.2d 369. And what is the other one
 18 we cited? We also there is also Tri-state Employment v. Mount
 19 Batten Surety Company, Second Circuit, 295 F.3d 256.

20 THE COURT: That's a little more recent.

21 MR. HARNIK: It says: Defendant failing to raise
 22 venue challenge in a pre-answer motion or responsive pleading
 23 defendant is deemed to have waived any objection to venue;
 24 citing the Concession case.

25 And, your Honor, they make that very point in their

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1 stay motion that this is not a transfer motion. So,
 2 procedurally, this case cannot be moved to California.

3 THE COURT: Where do they say that?

4 MR. HARNIK: That is here on page -- that's when they
 5 distinguish Altman. I will give it to you.

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6 THE COURT: Give it to me.
 7 MR. HARNIK: It is the brief defendant's opposition to
 8 plaintiff's cross-motion, page 10, and they say: Plaintiff
 9 also cites Altman v. Liberty Equities for the proposition that
 10 a section 1404 motion for change of venue and a Rule 12G
 11 dismissal knowing improper venue must be litigated
 12 contemporaneously -- with the cite. However, there is no
 13 motion to dismiss based on forum non conveniens or to transfer
 14 venue before this Court and Altman is inapplicable.

15 That's their brief. Page 10.

16 MR. DAVID: Your Honor, may I be heard now?

17 THE COURT: Yes, sir.

18 MR. DAVID: Let me address three points.

19 Number one, I'm not going to argue the merits of this
 20 case at this point in time. Think it is sort of meaningless to
 21 do so. But, Mr. Harnik has made exactly the point which I
 22 think this Court needs to consider and I will get to why it can
 23 do so in a moment.

24 Mr. Harnik says the judge in California made a mistake
 25 in coming to the conclusion that he did, that he should have

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1 integrated the documents and he didn't do so and you should
 2 find differently than the Judge in California and you should
 3 correct that mistake.

4 That's exactly the reason why there shouldn't be two
 5 cases pending, because you shouldn't be in the position of
 6 taking a judge of coordinate jurisdiction and saying, in
 7 exactly the same case, Hey, you made a mistake on your
 8 interpretation of the documents.

9 Now, I'm not suggesting this Court might not have a
 10 better view on the issue, but the fact of the matter is that
 11 the California Court has ruled and unfortunately, your Honor,
 12 with all due respect, I think it is inappropriate for
 13 Mr. Harnik to ask you to now overrule the California Court and
 14 tell it that it was wrong.

15 Number two. I believe Mr. Harnik is misreading his
 16 cases in terms of your ability to transfer this case. Even his
 17 case said if there are extraordinary circumstances if you
 18 didn't make the motion and you didn't put it in your responsive
 19 pleading, then the Court can still do it. But, those
 20 extraordinary circumstances aren't present in this case.

21 Well, the reason those extraordinary circumstances
 22 weren't present and they are present here is because you are
 23 now faced with a situation in which two judges on the two
 24 coasts of this country are going to be trying the same case
 25 with the same parties involved, and that makes absolutely no

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1 sense from any possible perspective.

2 Number three. Even Mr. Harnik's cases suggest that if
 3 we didn't make a pre-answer motion we can raise it in our
 4 papers when we file our answer. What's the point to that? The
 5 fact of the matter is you are now here in a situation and the
 6 situation calls for us to go forward in California and, yes, we
 7 did say in our papers that there was no then pending motion to
 8 transfer and the reason is very, very simple -- because there
 9 was already a motion pending in California to transfer the case
 10 here and it made absolutely no sense for there to be competing

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11 cases.

12 Can you picture the result? The Court in California
 13 says, okay, we are going to send it to New York. The Court in
 14 New York, because it has got a motion pending in front of it,
 15 says we are going to send it to California. Whoops.

16 It is a very, very simple situation we are faced with
 17 now, your Honor, and it is one that respectfully calls for only
 18 one answer. Unless you are going to be in the position of
 19 being faced with Mr. Harnik's argument that the Judge in
 20 California was wrong in his interpretation and you should
 21 overrule the judge in California, let's send the case to
 22 California, he can make his argument there that the judge was
 23 wrong and we will have a common decision without the risk of
 24 dispute between the two coasts. We have enough things to fight
 25 with with the west coast, we don't need to fight with them on

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1 this one. Let them have it.

2 MR. HARNIK: Judge, I think Mr. David, respectfully,
 3 is at best twisting words. He is twisting statements.

4 I never suggested that this Court overrule what
 5 California did. My only point is that we have brought a case
 6 here on the guarantees which is separate from what is being
 7 litigated in California, and that's always been separate. And
 8 we want to get that matter litigated here and promptly either
 9 by way of summary judgment or by trial which is scheduled for
 10 May 12th. We want to go forward with the guarantees and the
 11 note. This is a garden variety default on a guarantee and a
 12 note. All these other allegations that Mr. Oliphant is making
 13 really are irrelevant to that case.

14 And, your Honor, you don't need to deal with the
 15 California order. You only have to deal with the guarantee and
 16 the note which are Counts Two and Three of the complaint that's
 17 in this Court. And it is not correct that it would have been a
 18 waste of time for the defendants here to have answered because
 19 the point is they suggest that they could have made the motion
 20 to transfer here and there was a pending motion in California
 21 that was to transfer from California to New York and then, 'lo
 22 and behold, you have two different judges transfer each case to
 23 the other one without knowing what the other one is doing.
 24 That is not at all what happened here.

25 we had a motion to transfer in California, and what

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1 the defendants here should have done is they should have
 2 answered, as your Honor had stated, on the scheduling order.
 3 And then, if the case had been transferred from California to
 4 here, well, they could amend. And if it wasn't transferred, we
 5 go forward.

6 There was no reason for them to make a motion. It was
 7 simply dilatory. They had no basis to make that motion
 8 because, under no circumstances could this case, can this case
 9 be transferred to California. That is our point, straight and
 10 simple, and they waived it six different ways in all of the
 11 agreements that they signed and this is a sophisticated
 12 attorney who was with a major law firm who knew what he was
 13 signing. And, we even have an opinion from his own law firm
 14 saying that all the documents that he signed were proper and
 15 enforceable and he now comes in -- and he agreed that he

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16 wouldn't even plead that this was an inconvenient forum -- and
 17 what does he do? He comes in and he says it is an inconvenient
 18 forum and the whole matter should be litigated in California.

19 It is just not right. We have Judge Greenfield's
 20 decision, it is cited on page 4 of our brief.

21 THE COURT: Judge Greenfield.

22 MR. HARNIK: Former New York Judge, Eddie Greenfield,
 23 that the defendants should be estopped from even having made
 24 their motion. They had no basis to even have made their motion
 25 in this Court to have this case stayed. And that's all they

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1 asked for, was a stay. They never asked for a transfer.

2 MR. DAVID: Your Honor, if I might make one final
 3 point? Respectfully?

4 Your Honor, I understand what we are dealing with is
 5 what we are dealing not with, as they say, a negotiated forum
 6 clause where New York was the sole place where this case could
 7 be brought. It was a permissive provision that let them bring
 8 it here. It didn't stop us from bringing a case in California
 9 which was the first-filed case.

10 If you listen to what they're saying -- if they had
 11 negotiated to get exclusive jurisdiction in New York, that
 12 would be one thing. But, if you listen to what they are
 13 saying, having first brought a case in New York -- sorry --
 14 having first brought a case in California, all right, then as a
 15 matter of mandatory judicial rulings, according to them, we
 16 could have two pending cases because no matter what, even
 17 though we brought it if they waited a month, if they waited a
 18 week, if they waited whatever period of time, as long as they
 19 brought it in New York, all right, there is no way to get it
 20 out of New York.

21 Now, does that make sense? Is that what the law is
 22 supposed to be?

23 First filed case in California, on that alone -- all
 24 right -- on that alone they shouldn't have brought it here.
 25 They could have litigated the case in California. They chose

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82E5GREA argument

1 not to. All right? I don't know why.

2 But, this much I can tell you. Logically what they're
 3 saying makes no sense and the cases that they're relying upon
 4 don't deal with the situation we have got here: A permissive
 5 clause, a first-filed case in California, a ruling in
 6 California that they brought not to transfer.

7 This just makes no sense to go on two coasts.

8 THE COURT: well, I will have to read the cases that
 9 Mr. Harnik is relying on. I haven't read them. What is the
 10 cite on Judge Greenfield's case?

11 MR. HARNIK: That's cited at page, that's page 3 of
 12 our reply brief, it is Credit Francaise International S.A.

13 THE COURT: I see it.

14 MR. HARNIK: Just to come back, your Honor, to my
 15 point about the August 29th, 2006 engagement letter. In order
 16 for their case to have any validity, they would have to prove
 17 that at the time that that was signed we had no intention of
 18 fulfilling our obligations and these specific allegations,
 19 almost -- I mean, it is a remarkably similar case, the one with
 20 Judge Chin which is cited at, it is the Cafomi case at page 4,

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21 Cafomi v. College Partnership. This is age page 4 of our reply
 22 brief. Also, it had the same type of waiver provisions in the
 23 guarantees and the notes. And he says: In sum, College
 24 Partnership's fraudulent inducement defense amounts to nothing
 25 more than a breach of contract claim against Duncan for alleged

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argument

1 failures to fully perform the banking agreement. It is well
 2 established under New York Law that a fraud claim arising
 3 directly from the contractual relationship of the parties
 4 cannot be asserted simply by the inclusion of the allegation
 5 that the defendants falsely promised to comply with its
 6 obligations.

7 THE COURT: Well, that's a little different. This is
 8 a duress claim.

9 MR. HARNIK: Well, the duress is treated very
 10 succinctly in the CIT case which is on the next page of our
 11 brief where the Illinois Court said defendants also maintained
 12 that we should set aside the forum selection clause because it
 13 was, "forced upon them." The basis for this assertion is
 14 dubious. Having rejected Fidelcore's financing, defendants
 15 lost their alternative funding at the last minute ostensibly
 16 leaving Fidelcore as their sole resource. It is common place
 17 that parties accept unfavorable terms in exchange for desirable
 18 outcomes. Defendants do not argue that Fidelcore manipulated
 19 the circumstances which resulted in this agreement, nor can
 20 they contend that the forum selection clause itself is
 21 unreasonable or unjust. What we have here is the unremarkable
 22 story of a borrower in a weak bargaining position agreeing to a
 23 common albeit displeasing term. Other than defendants
 24 conclusory allegations, there is no evidence of duress, fraud,
 25 or even unfairness.

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argument

1 It is not enough. And incidentally, your Honor, they
 2 haven't even made the allegation of adhesion or duress in this
 3 case -- in the New York action.

4 THE COURT: Well, they haven't answered.

5 MR. HARNIK: No, but that's the basis for their claim,
 6 that they shouldn't be bound by the waivers that they signed
 7 that New York is the proper case for this case to proceed. The
 8 only way that your Honor could find that it is not proper --

9 THE COURT: I don't think that that's the way the
 10 waiver of jurisdiction reads. I don't think it says that New
 11 York is the only place it can proceed. I think it is a
 12 non-exclusory waiver saying that they consent to the
 13 jurisdiction in New York.

14 MR. HARNIK: Correct. And what Judge Scheindlin and
 15 Judge Cedarbaum say is that once plaintiff chooses New York --

16 THE COURT: That's why I have got to read those cases.
 17 MR. HARNIK: They're bound by it, irrevocably.

18 THE COURT: I have got to see that they, those cases
 19 involve similar circumstances to the case here where you have
 20 two cases in different jurisdictions.

21 MR. HARNIK: They do.

22 THE COURT: All right. Well, we will take a look.

23 MR. DAVID: Your Honor, you have already made the
 24 point that I was going to make, which is this is not the place
 25 nor the time to be arguing the merits what our merits are or

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aren't.

There is simply a procedural question before you and that procedural question is, Do you want to have the same case going on in two different court houses and with the nonpermissive provision, all right, with the first commenced action elsewhere? And, please, I caution the Court that that's an important issue now, all right, because it is not a situation where they commenced an action here and we commenced an action someplace else, all right, and the Court is going to say, well, you agreed to be here so you can't argue that it is inconvenient for witnesses and it should be someplace else where you started. It is that everybody had the ability to resolve it in the first commenced action, they chose to do a subsequent action here.

That's the procedural question that's before you and I'm not going to argue the merits. I'm not going to get drawn off into arguing the irrelevancies. It is simply that issue, respectfully.

MR. HARNIK: One last point.

In terms of the first to file -- and this is addressed in our papers -- their filing was, without a doubt, an anticipatory filing. We had sent them a notice of default in August. We followed up with a notice of acceleration. They filed on September 5th, but guess what? They never served it. The first time that I had an inkling that they had brought a

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case in California was exactly one day before we filed our case in New York.

THE COURT: Does anyone know whether they were filed in the state court in California?

MR. HARNIK: Correct.

THE COURT: Now, filing in federal court initiates an action. It used to be in New York State that you had to serve the parties before the action was initiated. What is the law in California?

MR. DAVID: Your Honor, respectfully, I don't know that. I would be glad to look it up and submit something to the Court but I'm not going to make representation as to something I don't know.

THE COURT: But in New York State it always was you had to get service before the action was commenced and only in Federal court is the filing of the --

MR. DAVID: Based upon the materials which appear to have been filed in Federal court in response to their motion I believe the filing is sufficient to commence the action but I don't want to make a representation.

THE COURT: Of course.

Well, it is something we can determine. Anything else to be heard?

MR. DAVID: Your Honor, I just might note one thing. Perhaps it was missed but they conceded that they were served

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before they commenced this action.
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 2 THE COURT: I think the day before.
 3 MR. DAVID: Right. And, respectfully, I don't think
 4 the anticipatory filing doctrine is applicable. What happened
 5 was quite clearly they served, in essence, the equivalent of a
 6 notice of default, not knowing they were filing his own action
 7 filing their action to contest the notice of default. That's
 8 not anticipatory filing.
 9 THE COURT: Well, it depends. I mean, if you have
 10 that New York rule, if that same rule applied, there were cases
 11 where people would file a complaint and then negotiate, sort of
 12 being held and not served while they negotiated and then to
 13 serve it.
 14 MR. DAVID: That's not what happened here, as the
 15 facts are conceded.
 16 THE COURT: Well, it wasn't mentioned according to the
 17 papers I read. It was not mentioned by Mr. Draper's -- was
 18 that her name -- during the telephone conference or during the
 19 conference that was held with the principals of Greystone.
 20 MR. DAVID: Your Honor, may I suggest what both sides
 21 should do is we may want to provide you with a copy of the
 22 motion papers that were filed in California. That might give
 23 you better perspective on what occurred.
 24 THE COURT: Well, that might be.
 25 MR. HARNIK: But, your Honor --
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 1 THE COURT: I thought I had most of them but maybe I
 2 don't. You are entitled to supplement that then, if you want.
 3 MR. DAVID: Thank you, your Honor.
 4 MR. HARNIK: Your Honor, you are correct and Mr. David
 5 has not even suggested an answer for why, having filed the
 6 action in California on September 7th, they didn't serve it.
 7 And they only gave us notice of it on the 25th and there is
 8 nothing in the record, as far as I know --
 9 THE COURT: Well, the negotiations were going on.
 10 MR. HARNIK: There were negotiations. Exactly. It
 11 was the opposite. They didn't want to us know that they had
 12 filed.
 13 MR. DAVID: Your Honor, I'm not questioning that the
 14 reason why was we were trying to make a deal. And you can
 15 imagine, as you were suggesting before, that we tried to sit
 16 down and discuss this, that there might be a chilling effect
 17 from knowing that we had started a lawsuit on negotiations.
 18 THE COURT: Yes.
 19 MR. DAVID: But, that's not the doctrine. The
 20 doctrine isn't, oh, tell them that you started a lawsuit. The
 21 doctrine is you started a lawsuit because you knew the other
 22 side was starting a lawsuit and you wanted to race to the court
 23 house. There is no evidence here that that's what happened.
 24 There is evidence that we got a default notice, we
 25 started an action. Yeah, we didn't say to them, Hey, guys. By
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 1 the way, we are going to sue you. All right? We said let's
 2 talk. And we didn't try to use the action we started as a
 3 lever to talk.
 4 THE COURT: But then, on the other hand Mr. David,
 5 Mrs. Draper did not consent to service and her client did not
 6 consent to service when the papers were served by Federal
 Page 17

7 Express or something like that; which indicates to some extent
8 that there were games being played at the time of service.
9 MR. DAVID: Your Honor, respectfully, by that point
10 the action in California had already been filed.
11 THE COURT: I didn't say it hadn't been. But, for
12 some reason she felt that it would be best not to consent to
13 service.
14 MR. DAVID: But we are not even arguing that issue at
15 this point, your Honor. That issue is resolved by you.
16 THE COURT: I did resolve it, in your favor.
17 MR. DAVID: Always saying it is a very, very simple
18 proposition: First to file, there is an action that will be
19 continuing. All right. This clause is permissive so you can't
20 read the clause as precluding us from coming to you and saying,
21 hey, Judge --
22 THE COURT: I will have to read those cases.
23 MR. DAVID: I don't think those cases -- those cases
24 are not similar in any way. They don't deal with a first-filed
25 case. That's all I'm saying to you.
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1 THE COURT: I gather that.
2 MR. HARNIK: Judge, you know, it is actually ironic
3 because here Mr. David says that we could have filed in
4 California. We didn't even know that there was an action in
5 California. Why would we have filed in California?
6 MR. DAVID: You were served the day before, sir. You
7 acknowledge that.
8 MR. HARNIK: I can put on the record, your Honor, that
9 when we filed this complaint I did not know that there was an
10 action in California.
11 MR. DAVID: But your client did.
12 MR. HARNIK: There may have been.
13 MR. DAVID: You just acknowledged it. You just
14 acknowledged before.
15 MR. HARNIK: I was told by Jones Day that on the day
16 before they got notice of an action but, you know, there was no
17 communication.
18 MR. DAVID: Well, that's -- that's my fault.
19 MR. HARNIK: So, we had prepared our papers a week or
20 more before that and there was no reason for to us know that we
21 were engaged in any kind of litigation in California.
22 THE COURT: well, as I said earlier --
23 MR. HARNIK: And Mrs. Draper certainly could have
24 mentioned it.
25 THE COURT: It should be settled. That's what should
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1 happen to the case.
2 MR. DAVID: I will convey to my client the Court's
3 perspective, your Honor.
4 MR. HARNIK: May I address then the scheduling order?
5 Because we have a May 12th date and we should --
6 THE COURT: I have got that in mind.
7 MR. HARNIK: We should be in discovery right now.
8 THE COURT: I have got that in mind.
9 MR. HARNIK: The defendants defaulted on the Rule 26
10 and we have no discovery.
11 MR. DAVID: Your Honor, we didn't default on the Rule
Page 18

12 26. All right? I mean, let's not make allegations that in
13 fact are not true. We did not default on the Rule 26. We
14 hadn't even been served. And the Court did make that
15 determination.
16 MR. HARNIK: So.
17 THE COURT: All right.
18 MR. HARNIK: I think, your Honor, we can, we should
19 have some guidance on -- as I mentioned, we certainly are
20 amenable to mediation in New York and would be glad to go ahead
21 with that immediately but, at the same time, we have to move
22 this case along.
23 MR. DAVID: Your Honor, I believe the case should move
24 too. We agree on that. I just think it should be moved to
25 California.

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1 THE COURT: well, we will have to see and keep in mind
2 that I may order that the clients appear. And if they appear,
3 I think their main counsel will appear to see if this case
4 can't be settled. That's it.
5 MR. DAVID: Thank you, Your Honor.
6 MR. HARNIK: Thank you, your Honor.
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